

July 15, 2019

**By Electronic Submission**

Ms. Ann E. Misback  
Secretary  
Board of Governors of the Federal Reserve System  
20th Street and Constitution Avenue, NW  
Washington, DC 20551

**Re: Notice of Proposed Rulemaking on Control and Divestiture Proceedings (Docket No. R-1662; RIN 7100-AF 49)**

EnerBank USA (“EnerBank” or “we”) greatly appreciates the opportunity to respond to the Board of Governors of the Federal Reserve System’s (“Board”) request for comment in its notice of proposed rulemaking regarding control and divestiture proceedings (“NPR”). EnerBank is an industrial loan company (“ILC”) founded on June 1, 2002 and headquartered in Salt Lake City, Utah. EnerBank provides unsecured home improvement loans to consumers working with strategic business partners and independent home improvement contractors throughout the United States. EnerBank’s strategic partners include manufacturers, distributors, franchisors, and major retailers of home improvement, remodeling, and energy saving products and services.

It is owned by CMS Energy which operates Michigan’s largest electric and natural gas utility.

We applaud the Board for clarifying and codifying its body of interpretations and guidance regarding the definition of “control” under the Bank Holding Company Act (“BHC Act”) and the Home Owners’ Loan Act (“HOLA”). We believe the proposed framework for investments below the 5%, 10%, 15%, and 25% thresholds will encourage capital formation for ILC parent companies and resolve much of the investor confusion that we have experienced.

**ILCs, the Bank Holding Company Act, and the Volcker Rule**

ILCs like EnerBank are state-chartered depository institutions that operate with limited powers under state law. The BHC Act exempts a company that controls an ILC from BHC Act rules as well as from supervision by the Board.

Despite this exemption, one section of the BHC Act, the Volcker Rule, does apply to ILCs and their affiliates because of the definition of “banking entities” under the Volcker Rule. Under the Volcker

Rule, a “banking entity” is defined broadly to include all FDIC-insured depository institutions, including ILCs and all of their affiliates.<sup>1</sup> By incorporating banking law definitions of “affiliate” and “control,”

the Volcker Rule applies to the entire company complex to which an insured depository institution belongs—any entity that controls, is controlled by, or is under common control with a banking entity is also a banking entity. Consequently, even though special-purpose banks, such as ILCs, are specifically excluded from the definition of “banks” under the BHC Act, they and all of their affiliates are “banking entities” for purposes of the Volcker Rule.

Historically, the Board determined whether an investor owning between five and 25 percent of the voting stock of an entity had control of the entity by reviewing the individual facts and circumstances of the investment.<sup>2</sup> This approach provided investors too little clarity to make investment decisions. Rather than bear the risk of becoming subject to the BHC Act, many investors erred on the side of predictability, avoiding making investments that might trigger control. Capital markets are less liquid than they would have been otherwise as a result.

Potential investors exploring opportunities to invest in non-financial companies, such as EnerBank’s parent company, CMS Energy, have been acutely affected by the opacity of the Board’s old process and the lack of certainty it provided and are even more affected now by the lack of clarity of the meaning of control because of the risk that investors will be subject to the Volcker Rule, a prohibitive consequence for many investors. Accordingly, institutional investors are designing their investments in such non-financial companies to avoid taking certain positions that might subsequently be deemed controlling. Thus, the uncertainty and risk of becoming a banking entity has materially discouraged investment, thereby limiting the access to capital for certain non-financial companies. We believe the NPR’s proposed framework for the presumption of control mostly resolves these issues and will encourage much needed capital formation among the non-financial parent companies of ILCs.

### **ILC Parent Companies and the Change in Bank Control Act**

While the NPR resolves much of the technical confusion concerning control determinations, we believe it is important to discuss our personal experiences to provide context as to why additional reform is needed.

In the past, CMS Energy had a large mutual fund shareholder that wanted to increase its ownership above ten percent but was advised against it by its legal counsel due to concerns about application of the Volcker Rule. The BHC Act and, thus, the Volcker Rule do not have a statutory or regulatory threshold at ten percent. However, the Change in Bank Control Act (“CIBC Act”) does. The shareholder’s counsel correctly noted that a control threshold was triggered by exceeding ten percent but failed to note that triggering the CIBC Act’s disclosure requirements did not preclude the shareholder from rebutting a presumption of control for the Volcker Rule to apply. It is also possible that the confusion could operate in reverse—a misapplication of the BHC Act to the CIBC Act—leading an investor to believe it has

<sup>1</sup> See definition of “affiliate.” 12 U.S.C. § 1841(k).

<sup>2</sup> See FRB Statement on Non-controlling investments. 12 C.F.R. § 225.143. There is a statutory provision determining a company does not control at the ownership, control or power to vote level of less than 5% of the voting securities of another company and a statutory provision determining conclusive control at the ownership, control or power to vote 25% or more of the voting securities of another company. 12 USC §§ 1841(a)(3), (a)(2)(A).





satisfied the requirements for rebutting control under the NPR to fail to provide the necessary disclosures under the CIBC Act.

There is a real concern that many more investors have been and are deterred from increasing their investment about which CMS Energy has no knowledge. CMS Energy is likely not unique because institutional investors tend to avoid increasing their investment in the non-financial parents of ILCs above ten percent to avoid the perceived risk of becoming subject to the Volcker Rule.

Question Number 40 of the NPR asks:

The proposal would add a new section to Regulation Y and Regulation LL that would define control over securities for all purposes in Regulation Y or Regulation LL (including, for example, in the context of notices pursuant to the Change in Bank Control Act of 1978), as applicable. Should the proposed new section apply for all purposes under the regulations or should it only apply for purposes of determining control due to controlling influence?

In response, we believe the Board should consider applying the NPR's proposed framework to the CIBC Act's regulations for determining control. Notably, doing so would also require that the CIBC Act's threshold be changed from "own, control, or hold with power to vote 10 percent or more" to a more tailored and internally consistent "control with power to vote 10 percent or more" of a company's voting securities. As currently drafted, the NPR would not resolve the confusion between the two statutes. Arguably, the confusion could be exacerbated by the continued divergence between them. Providing one consistent control framework for the Board's regulatory regime is the best way to resolve the confusion and further encourage capital formation.

## **Conclusion**

EnerBank appreciates the Board's proposed reforms and the opportunity to comment on ways that we believe will promote safety and soundness of the banking industry while fostering economic growth. Please do not hesitate to contact me if we can be helpful. We look forward to working together to create a tailored, risk-focused regulatory framework for the banking system.

Sincerely,

Kristin Dittmer  
Executive Vice President & Chief Financial Officer  
EnerBank USA